LIBRARY
SUPREME COURT, U.S.

OCT 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 569

ISADORE D. BLUMENTHAL,

Petitioner,

v.

LEON REINER AND WIFE, BERTHA REINER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

MAURICE A. WEINSTEIN,
FRED B. HELMS,
Attorneys for Petitioner
1502 Liberty Life Building
Charlotte 2, North Carolina.

WILLIAM H. BOBBITT, JR.,
Of Counsel.

INDEX

		PAGE
I.	OPINION BELOW	5
II.	GROUNDS OF JURISDICTION	6
III.	QUESTIONS PRESENTED	6
IV.	CONSTITUTIONAL AND STATUTORY PROVISIONS	7
V.	STATEMENT OF THE CASE	8
VI.	BASIS OF FEDERAL JURISDICTION	16
VII.	REASONS FOR GRANTING THE WRIT	17

(A) The judgment of the United States Court of Appeals for the Fourth Circuit deprived the petitioner, defendant-appellant below, of his right to trial by jury, as preserved by the Seventh Amendment to the Constitution of the United States, by affirming a judgment of the District Court wherein the Judge of the District Court granted the motion of the respondents, plaintiffs-appellees below, for judgment notwithstanding the verdict of the jury, where the evidence in favor of the defendant-appellant below was such that the Judge of the District Court had peremptorily instructed the jury to render, and the jury accordingly had rendered a verdict in favor of the petitioner, defendant-appellant below, and where there was substantial evidence in behalf of the petitioner, defendant-appellant below, which clearly raised jury issues.

(B) The judgment of the United States Court of Appeals for the Fourth Circuit, in affirming the judgment of the District Court, condoned the forfeiture of corporate stock pledged as collateral, such decision being in conflict with applicable and established state law and in conflict with the law established by the United States Courts of Appeals of other circuits, and did such judgment thereby depriving the petitioner, defendant-appellant below, of his property without due process of law, in that the Court below failed to apply the established "law of the land".

ARGUMENT:

(A) TRIAL BY JURY 18

(B) FORFEITURE OF PLEDGE 30

CONCLUSION 34

APPENDIX:

Opinion of the United States Court of Appeals for the Fourth Circuit 35

CITATIONS.

PAGE

Audirsch v. Texas & Pacific Railway Co., 195 F. 2d 629 (C.C.A. 5th) 19

Burcham v. J. P. Stevens Co., 209 F. 2d 35, (C.C.A. 4th) 19

Cole v. Manufacturers Trust Co., 299 N.Y.S. 418 32

Dale v. Pattison, 34 S. Ct. 785, 234 U. S. 399, 58 L. Ed. 1370 31

Fairbanks v. Twin City, 170 N. C. 315, 86 S. E. 1051 28

Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond, 43 S. Ct. 651, 262 U. S. 649, 67 L. Ed. 1157 31

First Trust and Deposit Co. v. Potter, 278 N.Y.S. 847 31

Floyd v. Ring Construction Corp., 165 Fed. 2d 125 (C.C.A. 8th) 23

Galloway v. United States, 63 S. Ct. 1077, 319 U.S. 372, 87, L. Ed. 1458 ..... 26, 30

Garrison v. United States, 62 F. 2d 41 (C.C.A. 4th) 27

Hawley v. Hawley, 114 F. 2d 745 (C.C.A.-D.C.) 32

Huddleston v. Dwyer, 64 S. Ct. 1015, 322 U.S. 232, 88 L. Ed. 1246 31

In re Kiames Estate, 309 N. Y. 329, 130 N.E. 2d 745 32

Kress v. Fisher, 65 F. 2d 682 (C.C.A. 4th) 23

Levine v. Susser, 189 N.Y.S. 106 33

O'Day v. Chicago River Railroad Co., 216 F. 2d 79 (C.C.A. 7th) 19

C. H. Pope & Co., Inc. v. Bibb Mfg. Co., 290 F. 586 (C.C.A. 2nd) 23

Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 25

Tarter v. United States, 17 F. Supp. 691, 692-693 26

Tennant v. Peoria Ry. Co., 64 S. Ct. 409, 321 U. S. 29, 88 L. Ed. 520 20

Tiller v. Atlantic Coastline R. R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 ..... 19, 28

PAGE

UNITED STATES CONSTITUTION.

Article V of the Amendments 7

Article VII of the Amendments 8

UNITED STATES STATUTE.

28 U. S. C. A. 1652 8, 31

NEW YORK STATUTE.

Article IX, Sec. 200 et. seq. Lien Law 32

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 50 24

TEXT.

Williston, Contracts 616 23

IN THE
OCTOBER TERM, 1957

No.....

ISADORE D. BLUMENTHAL, *Petitioner*

versus

LEON REINER AND WIFE, BERTHA REINER, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In accordance with the provisions of Rule 23 of the Revised Rules of the Supreme Court of the United States, Isadore D. Blumenthal, petitioner, defendant-appellant below, does hereby petition the Supreme Court of the United States for writ of certiorari to the United States Court of Appeals for the Fourth Circuit in the foregoing case, and in support of such petition, presents the following:

I. — Opinion Below —

The official report of opinion was filed by the United States Court of Appeals for the Fourth Circuit on the 19th day of July, 1957, entitled as follows:

No. 7422

Isadore D. Blumenthal, Appellant

versus

Leon Reiner and wife, Bertha Reiner, Appellees

No. 7382

Isadore D. Blumenthal, Appellant

versus

Leon Reiner and wife, Bertha Reiner, Appellees.

At the time of preparation of this petition the opinion had not appeared in the unofficial reports.

The opinion of the Court below appears in the Appendix hereto at page 35.

II. Grounds of Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked on the following grounds:

A. The judgment sought to be reviewed is dated and was entered by the United States Court of Appeals for the Fourth Circuit on the 19th day of July, 1957.

B. Petition for rehearing was filed with the United States Court of Appeals for the Fourth Circuit on the 17th day of August, 1957, which petition for rehearing was denied by order of said Court entered and filed on the 18th day of September, 1957.

C. The statutory provision which confers jurisdiction upon the Supreme Court of the United States to review the aforesaid judgment by writ of certiorari is Title 28 U.S.C.A. 1254, June 25, 1948, c. 646, 62 Stat. 938, which provides, inter alia, as follows:

"Courts of Appeals; Certiorari; Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree: - - -,"

III. Questions Presented for Review

The questions presented for review are:

A. Did the judgment of the United States Court of Appeals for the Fourth Circuit deprive the petitioner, defendant-appellant below, of his right to trial by jury, as

preserved by the Seventh Amendment to the Constitution of the United States, by affirming a judgment of the District Court wherein the Judge of the District Court granted the motion of the respondents, plaintiffs-appellees below, for judgment notwithstanding the verdict of the jury, where the evidence in favor of the defendant-appellee below was such that the Judge of the District Court had peremptorily instructed the jury to render, and the jury accordingly had rendered a verdict in favor of the petitioner, defendant-appellant below, and where there was substantial evidence in behalf of the petitioner, defendant-appellant below, which clearly raised jury issues?

B. Did the judgment of the United States Court of Appeals for the Fourth Circuit, in affirming the judgment of the District Court, condone the forfeiture of corporate stock pledged as collateral, and is such decision in conflict with applicable and established state law and in conflict with the law established by the United States Court of Appeals of other circuits, and did such judgment thereby deprive the petitioner, defendant-appellant below, of his property without due process of law, in that the Court below failed to apply the established "law of the land"?

IV. Constitutional and Statutory Provisions Involved

The constitutional provisions involved are:

A. Due Process of Law.

Article V of the Amendments to the Constitution of the United States which provides:

> "No person shall . . . be deprived of life, liberty, or property without due process of law . . ."
>
> (U.S.C.A. Const. Amendment V)

B. Trial by Jury.

Article VII of the Amendments to the Constitution of the United States, which provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."
(U.S.C.A. Const. Amendment VII)

C. State Laws as Rules of Decision.

"The laws of the several states, except where the Constitution or Treaties of the United States, or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

(Title 28, U.S.C.A. 1652, June 25, 1948,
c. 646, 62 Stat. 944)

V. Statement of the Case

This is an action instituted in the District Court of the United States for the Western District of North Carolina, Charlotte Division, by the plaintiffs, Leon Reiner and wife, Bertha Reiner, of New York City, the respondents herein, against the defendant, Isadore Blumenthal, of Charlotte, North Carolina, the petitioner herein, for the recovery of $25,000.00 and interest. (Complaint, Defendant's Appendix 1)

This action arises out of a written contract between the plaintiffs and the defendant, dated the 1st day of October, 1948, as modified and amended by contract between the

parties, dated January 23, 1951, for the purchase by the defendant from the plaintiffs of 45 shares of stock in L & B Reiner, Inc., a purported New York corporation. The purchase price as set out in the original contract was $190,000.00. At the time of the execution of the original contract the defendant paid to the plaintiffs $50,000.00 cash. At the time of the execution of the modified and amended contract on January 23, 1951, the defendant paid to the plaintiffs the additional sum of $25,000.00 cash and executed two promissory notes in the face amount of $25,000.00. This suit is on the two notes.

Under both the original agreement and the modified and amended agreement the 45 shares of stock were retained by the plaintiffs as collateral security under the provisions set forth in the written agreements.

The defendant filed his answer denying the claim made by the plaintiffs and setting forth his denial of indebtedness and counterclaim for the recovery of the $75,000.00 cash theretofore paid to the plaintiffs upon the grounds (1) that the contracts were procured through fraud by the plaintiffs, and (2) upon total failure of consideration, or (3) in the alternative for the recovery of at least, $32,645.00, being the difference between the book value of the 45 shares of stock and the amount of the notes, all in accordance with paragraph 2(c) of the modified and amended agreement between the parties, dated January 23, 1951. (Defendant's appendix 5)

Counterclaims (1) and (2) are not involved in this petition. Counterclaim (3) is involved in this petition under question A with respect to deprivation of right to trial by jury.

Annexed to the answer filed by the defendant-appellant, the following appeared:

> "Pursuant to the Federal Rules of Civil Procedure, notice is hereby given that the defendant demands a trial by jury of all issues raised by the pleadings in the above case."

The modified and amended agreement of January 23, 1957 among others, contained the following provisions:

> "2. The sum of $158,000.00 representing the unpaid balance of the purchase price for forty-five (45) shares of the common stock of the corporation sold by Leon Reiner and Bertha Reiner to Blumenthal pursuant to the terms of the aforesaid agreement, shall be paid as follows:
>
> (a) Simultaneously with the execution of this agreement, Blumenthal will pay to Leon Reiner and Bertha Reiner jointly the sum of $25,000.00.
>
> (b) Simultaneously with the execution of this agreement, Blumenthal will execute and deliver to Leon Reiner and Bertha Reiner two (2) promissory notes payable to their order with interest at three (3%) per cent per annum as follows: one note in the face amount of $10,000.00 payable on November 15, 1951, and one note in the face amount of $15,000.00 payable on November 15, 1952. Said notes shall provide that in the event the note first due is not paid on its due date, then the second note shall forthwith become due and payable.
>
> (c) *In the event of a default in the payment of either of the aforesaid notes, Leon Reiner and Bertha Reiner jointly shall forthwith be deemed to have purchased the said forty-five (45) shares of stock now owned by Blumenthal in the same manner as if an offer*

to sell the same had been made by Blumenthal at the book value thereof. The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive, Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute any action at law or otherwise to enforce collection of same.

(d). *The balance of $108,900.00 with interest at three (3%) per cent from the date hereof shall thereafter be payable only out of dividends paid on the corporate stock now owned by Blumenthal, corporate salaries, and bonuses or any other sums, if any, that may become due or payable to Blumenthal from the corporation. . . . If any balance, as aforesaid, remains unpaid on September 1, 1958,* Blumenthal does hereby sell, transfer, and assign the forty-five (45) shares of the corporate stock now owned by him to Leon Reiner and Bertha Reiner jointly, the purchase price to be the amount of said balance . . . *without any right of redemption thereto in Blumenthal* . . .

3. Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum." (Defendant's appendix 20).

Pursuant to the terms of the modified and amended agreement of January 23, 1951, Blumenthal paid to the Reiners the sum of $25,000.00 and delivered two promissory notes in the total sum of $25,000.00. As noted above, Blumenthal paid the Reiners $50,000.00 on October 1, 1948, thereby making the total paid on the stock the sum of $75,000.00.

The due date of the first of the two notes was November 15, 1951. Prior to that time, Blumenthal notified the Reiners

that the notes would not be paid in cash. On November 15, 1951, the due date of the first note, the Reiners declared that the second of the two notes was also due under the contract, and the Reiners further declared that they were henceforth the owners of the 45 shares of capital stock and that same had been forfeited pursuant to paragraph 2(c) of the contract of January 23, 1951. Defendant's appendix 72 to 74).

At the trial, it was stipulated that the book value of all ninety shares of the stock on November 15, 1951, was the sum of $111,899.40, and that the book value on said date of the 45 shares of the capital stock of the corporation purportedly issued to Blumenthal was $55,949.70. (Defendant's appendix 74).

Blumenthal contended that when the Reiners declared that the 45 shares of capital stock was forfeited to them, that same constituted a purchase by the Reiners at the book value of $55,949.70, and that the $25,000.00 due on the notes should be credited against said amount of book value of the stock, and the difference or balance paid to Blumenthal as alleged in the third counterclaim.

The corporation never declared and never paid any dividend whatsoever. (R.p. 105). The corporation never paid any salary, bonus or any remuneration whatsoever to Blumenthal. The corporation never paid to Blumenthal any expenses advanced by him. (R.p. 108, defendant's appendix 70).

Prior to trial, the plaintiffs filed motion for jugdment on the pleadings, which motion was denied. The plaintiffs there-

after filed motion for summary judgment, which was likewise denied, the District Judge stating:

> "There have been all sorts of motions and I have overruled them all. I am going to let the jury hear the matter."

Towards the conclusion of four days of trial the Judge of the District Court stated:

> "The Court makes this ruling for that the Court is of the opinion that the matter is one entirely for the jury and thereupon puts it to the jury with that thought in mind under the issues found in the record." (R.p. 538)

With reference to the meaning of paragraph 2(c), the defendant-appellant testified that it was his understanding, "that those notes would be paid and he would pay me for my stock $59,000 ($55,494.70), the book value, and we would just call it a day. (Defendant's appendix 95). And further, "I agreed to take book value $59,000.00 ($55,-949.70), and he agreed to pay me, and with that I paid those $25,000.00 notes." (Defendant's appe : 91). At that point in the trial, the Trial Judge stated: "I will leave it to the jury to construe but he says that is his understanding of the matter and he would be entitled to state that."

It is significant that such understanding was never denied nor refuted by the plaintiffs-appellees at the trial.

The Judge of the District Court submitted two issues to the jury:

(1) "Did the defendant execute the two notes, one in the sum of $10,000.00 and the other in the sum of $15,-

000.00, each dated January 23, 1951, as alleged in the complaint? At the time of the charge to the jury, the District Judge stated: "I have written down there that it is answered yes, by consent, because all parties agree that he did."

(2) "In what amount, if any, is the defendant indebted to the plaintiffs as alleged in the complaint?" On the second issue, in the charge to the jury, the District Judge stated:

> "I have given this matter considerable thought. I am of the opinion, at least in my own mind, that my interpretation of this contract is correct. I have had the benefit of especially fine argument from fine legal minds with respect to their thought and from studies that they have made and from cases that they have found and interpreted, and I have come to this conclusion. In interpreting this contract on this date, October 11, 1956, as against the time when it was made on January 23, 1951, that when the defendant Blumenthal failed in November of 1951 to pay the first note of $10,000.00 that the plaintiffs had the right to accelerate the $15,000.00 note . . .; and that then, under the terms of the contract, that they had the right and they were deemed to have purchased the 45 shares of stock that was then owned by Blumenthal in the same manner as if he, Blumenthal, had offered to sell the same to them at the book value, which admittedly was $55,949.70; and that when they did that, as the evidence tends to show they did . . . that then, having done that, they then agreed to pay the sum of $55,949.70 for the taking over of that particular 45 shares of stock; and I instruct you that if you find such facts to be from the evidence and by its greater weight, the burden being on the defendant, that the defendant would then be in law entitled to have his notes credited in full with so much of the $55,000 as it took to exonerate him from further liability of responsibility under those two notes, and having so done that, it would be your duty, and I instruct you peremptorily as a matter of law that it is your duty

and responsibility to answer that second issue, "nothing". (R.p. 557, 559, Defendant's appendix 63).

The jury rendered the unanimous verdict of "nothing" on the second issue and judgment was entered accordingly on October 11, 1956. (Defendant's appendix 35).

The defendant submitted an issue based upon the third counterclaim, as follows:

> "Should the surplus of the purchase price at book value of the 45 shares of stock issued to the defendant, over the credit on the two notes, be paid to the defendant?"

The Court refused to submit the above issue to the jury, to which the defendant excepted. The defendant requested the following instructions upon the above issue based upon the third counterclaim:

> "If the jury, by the greater weight of the evidence, find the facts to be as all the evidence tends to show, the jury will answer that issue: Yes."

The Court refused to give the above instruction, to which the defendant excepted.

Within apt time, after reception of the verdict and on October 16, 1956, the plaintiffs filed a motion for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure. Approximately two months later, on December 20, 1956, the Judge of the District Court rendered a memorandum decision to the effect that he was setting aside the verdict and the judgment entered on Octo-

ber 11, 1956, in favor of the defendant, and would enter judgment in accordance with the motion of the plaintiffs for a directed verdict in favor of the plaintiffs. (Defendant's appendix 37). The defendant objected and excepted. (Defendant's appendix 47).

Accordingly, on January 28, 1957, judgment notwithstanding the verdict of the jury was entered in favor of the plaintiffs and against the defendant. (Defendant's appendix 49). The defendant objected and excepted. (Defendant's appendix 51).

The defendant-appellant appealed to the United States Court of Appeals for the Fourth Circuit from the judgment notwithstanding the verdict, being Case No. 7422 before the Circuit Court. The defendant-appellant also appealed to said Circuit Court from the order of the District Judge dismissing the counterclaims, being Case No. 7382 before the Circuit Court.

The judgment of the District Court was affirmed by the United States Court of Appeals for the Fourth Circuit by opinion filed on July 19, 1957.

The result of the judgment of the District Court and the affirmation by the United States Court of Appeals for the Fourth Circuit means that the plaintiffs-appellees will have received a total of One Hundred Thousand ($100,000.00) Dollars plus interest from the defendant-appellant in return for which the defendant-appellant has received nothing and will never receive anything.

VI. Basis of Federal Jurisdiction

The basis for federal jurisdiction in the court of first instance, namely, the United States District Court for the

Western District of North Carolina, was diversity of citizenship, pursuant to Article III, Section 2(1) of the Constitution of the United States, the plaintiffs-appellees being residents of the State of New York, and the defendant-appellant being a resident of the State of North Carolina, the amount in controversy being in excess of $3,000.00 exclusive of interest.

VII. Reasons for Granting the Writ

The writ of certiorari should be allowed in the present case because:

(a) The judgment of the United States Court of Appeals for the Fourth Circuit deprived the petitioner, defendant-appellant below, of his right to trial by jury as preserved by the Seventh Amendment of the Constitution of the United States, by affirming a judgment of the District Court wherein the Judge of the District Court granted motion of the respondent, plaintiffs-appellees below, for judgment notwithstanding the verdict of the jury, where substantial evidence in behalf of the petitioner, defendant-appellant below, raised jury issues and where the evidence was in fact such that the Judge of the District Court peremptorily instructed the jury to render, and the jury accordingly rendered, a verdict in favor of the petitioner, defendant-appellant below. Accordingly, the Court below has decided a federal question of unusual gravity and general importance in conflict with the applicable decisions of this Court, and in conflict with decisions of other courts of appeals, and has so far departed from the accepted course of judicial proceedings as to call for this Court's power of supervision.

(b) The judgment of the United States Court of Appeals for the Fourth Circuit, in affirming the judgment of

the District Court, condoned the forfeiture of corporate stock pledged as collateral, such decision being in conflict with applicable and established state law, and in conflict with law established by other courts of appeals, thereby depriving the petitioner, defendant-appellant below, of property without due process of law in that the Court below failed to apply the established "law of the land".

ARGUMENT

The following argument is presented to amplify the aforesaid reasons for allowance of the writ:

A. THE DECISION OF THE COURT BELOW DEPRIVES THE PETITIONER OF HIS RIGHT TO TRIAL BY JURY.

The Judge of the District Court did not have the right, under the evidence and the existing law, to grant the motion for judgment notwithstanding the verdict of the jury. The Judge of the District Court on account of the overwhelming evidence in favor of the petitioner had peremptorily instructed the jury to answer the second issue "Nothing", which was a finding on the part of the Judge that there was no substantial evidence to support recovery by the Plaintiffs, and that there was overwhelming evidence before the Court in behalf of the cause of the defendant. *We have been unable to find a reported case from any jurisdiction, either state or federal, where a trial judge has granted a motion for judgment notwithstanding the verdict after having previously given a peremptory instruction or a directed verdict in favor of the opposing party.*

The test of when a jury trial is required under the Seventh Amendment was well stated by Mr. Justice Black in

the case of *Tiller* vs. *Atlantic Coastline R. R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, wherein it was stated:

> *"Where the facts are in dispute and the evidence in relation to them is that from which fair-minded men may draw different inferences, the case should go to the jury."*

The standard to be followed on a motion for judgment notwithstanding the verdict are clear. Chief Judge Parker, in the case of *Burcham* v. *J. P. Stevens Co.*, 209 F. 2d 35, (C.C.A. 4th) stated:

> "It is well settled that on a motion for a directed verdict, or on motion for judgment non obstante veredicto based on such motion, the evidence must be considered in the light most favorable to the party against whom the directed verdict or the judgment non obstante veredicto is asked, that any conflict in evidence must be resolved in his favor, and that every conclusion or inference that can be legitimately drawn therefrom in his behalf must be drawn. When this rule is applied here, we think that the case was one for the jury."

It should be noted that Chief Judge John J. Parker did not sit on the Court below when the case at bar was heard.

The above rule of law has also been stated by other United States Courts of Appeals. *O'Day* v. *Chicago River Railroad Co.*, 216 F. 2d 79, (C.C.A. 7th); *Audirsch v. Texas & Pacific Railway Co.*, 195 F. 2d 629 (C.C.A. 5th).

It is also significant to state that the petitioner presented numerous citations of authority from the decisions of the Fourth Circuit, from federal jurisdictions, and from this Court, in his briefs filed with the Court below, and in oral argument. It is noted that the opinion of the Court below

fails to cite, let alone distinguish or overrule, a single decision with respect to the petitioner's claim to the right of trial by jury.

In the case of *Tennant* vs. *Peoria Ry. Co.*, 64 S. Ct. 409, 321 U. S. 29, 88 L. Ed. 520, it was stated:

> "The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences, or conclusions, or because the Judges feel that other results are more reasonable."
>
> "Upon an examination of the record we cannot say that the inferences drawn by this jury that respondent's negligence caused the fatal accident is without proper support in evidence. *Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial.* No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

The opinion of the Court below summarily disposes of the petitioner's right to trial by jury in the following words:

> "The defendant argues that the terms of the agreement are ambiguous and therefore should have been submitted to the jury for their interpretation. We think, however, that the agreement is not ambiguous and agree with the position taken not only by the plaintiffs but by the defendant himself in the trial below, that the question was one to be determined by the Judge." (Appendix hereto p. 48)

The opinion of the Court below states that the agreement is "not ambiguous", yet in its opinion, the Court below refers

to and relies upon numerous matters of evidence outside the written agreement in reaching its conclusion as to the meaning of the agreement. The Court below opens some of its paragraphs as follows:

(a) "Such a result could not have possibly been contemplated by the parties."

(b) "Keeping these facts in mind, it is seen that the defendant's position is untenable."

(c) "The situation of the parties at the time of the settlement of January 23, 1951, as disclosed by the undisputed evidence, was such that the interpretation of the defendant cannot be reasonably entertained."

It is also noted that the Judge of the District Court in his opinion setting aside the judgment notwithstanding the verdict considered and relied upon numerous matters of evidence outside of the written agreement. (Defendant's appendix 47). It is also significant that a reading of the opinion of the Court below in comparison with a reading of the opinion rendered by the District Judge clearly indicates that both not only considered and relied upon numerous matters of evidence outside of the written agreement, but also that they arrived at their conclusions upon different grounds.

It was, obviously, necessary for the Court below and the District Judge to consider the evidence outside of the written agreement because any attempt to determine the meaning of the contract standing alone runs head-on into the conflict between the provisions in paragraph 2(c) and paragraph 2(d) of the agreement.

Paragraph 2(c) provides that Reiners "shall forthwith be deemed to have purchased the said 45 shares of stock . . .

at the book value thereof". The Reiners were deemed to have purchased the stock at the book value thereof, but no statement is made in the agreement as to how, when, or where the Reiners were to pay for the stock. *No statement is made in the agreement as to what shall be done with the proceeds of the sale of the stock.* Under paragraph 2(d) the purchase price of the stock was to be determined in an entirely different manner and the sum of $108,900 was not due until September 1, 1958, a time which has still not arrived. The sum under paragraph 2(d) was *"payable only out of dividends paid on corporate stock now owned by Blumenthal, corporate salaries, and bonuses, or any other sum, if any, that may become due and payable to Blumenthal."* The paragraph does not state that the proceeds of any sale of the stock under paragraph 2(c) shall be applied to the $108,900. At the time of the purchase of the stock by the Reiners, nothing was due on the $108,900 either from the source of funds or the time of payment.

Accordingly, standing alone, the agreement is ambiguous. The Trial Judge, during four days of trial, was also of the opinion that the contract was ambiguous, when he made the following statements:

> "The contract, in some ways is somewhat unfortunately worded; but I believe the jury can get what the parties had in mind. I think they can ultimately do that." (R.p. 249)

> "As I say, this contract looked at first like it was plain and simple as could be, but when the subsequent factors come about, then it creates a situation which calls for thinking, and *I have thought about it pretty hard myself, and I am in a quandary again."* (R.p. 513).

"Gentlemen, the only thing I am interested in now is to determine the issues and submit it to the jury." (R.p. 487).

"This is where he contends that the notes had been paid when the stock was carried over, *and I think the contract is ambiguous enough that it is a question for the jury to determine.*" (R.p. 489).

"I got back in chambers during the noon recess and carried this contract with me and began to read it again and to study its four corners, and *I declare to you it is a messed up thing. There is no doubt about that.*" (R.p. 232).

It has been well established as a general rule that interpretation of the meaning of a contract is a matter for the jury where its meaning is uncertain or ambiguous. *Kress* v. *Fisher*, 65 F. 2d 682 (C.C.A. 4th). The law is well stated in the case of *Floyd* v. *Ring Construction Corp.*, 165 Fed. 2d 125 (C.C.A. 8th), as follows:

"The law is that the terms of a contract, if it be ambiguous, are matters of fact to be determined in the same manner as other facts; by the jury, if it be a jury case, or by the court, if the jury be waived; while the construction of the contract and its legal effect are questions of law for the court."

And further, in the case of *C. H. Pope & Co., Inc.* v. *Bibb Mfg. Co.*, 290 F. 586 (C.C.A. 2), the Court stated:

"The jury's function in the construction of documents arises wherever, in view of the surrounding circumstances and usages offered in evidence, the meaning of the writing is not so clear as to preclude doubt by a reasonable man of its meaning." *Williston, Contracts 616.*

The above quotation from the opinion of the Court below states that the petitioner took the position in the trial below that the question was to be determined by the Judge. The Court seems to be taking the position that the petitioner waived his right to trial by jury. The petitioner demanded a trial by jury in his pleadings, understood throughout the trial that the jury was impaneled to hear and decide the issues that were involved, and did not waive his right to have his cause heard by that jury. The making of a motion for a directed verdict does not constitute a waiver of trial by jury. Rule 50 of the Federal Rules of Civil Procedure, states:

> *"A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts."*

There was no waiver of right to a jury trial by the petitioner. At the conclusion of all of the testimony, both sides prepared to argue to the jury, the Trial Judge stating, "Gentlemen, in the argument to the jury, the Plaintiffs will have both the opening and the conclusion." And the Trial Judge further stated: *"The Court is of the opinion that the matter is one entirely for the jury, and thereupon puts it to the jury with that thought in mind under the issues found in the record."* Approximately 12 times during the trial, the Judge of the lower court announced that the evidence and the proper construction of the contract were in favor of petitioner. (Rpp. 154, 155, 156, 157, 158, 159, 190, 214, 216, 240, 248, 249). (Defendant's appendix 69-70). Illustrative of such pronouncements is the following: "So I will hold, and I will instruct the jury on the evidence thus far at the proper time, that these parties owe Blumenthal $55,-949.70 against which he owes them $25,000.00 and interest, and that he would be entitled to have and recover of the

plaintiffs on his counterclaim such difference as there was between the $25,000.00 and the $55,000.00." (Defendant's appendix 69).

The petitioner, therefore, requested that the lower court so direct the jury or give a peremptory instruction to that effect. Doing so did not constitute a waiver of trial by jury nor consent by the petitioner that the Judge of the lower court could ever decide the questions at hand in favor of the respondents and without the intervention of the jury.

The right to trial by jury is a fundamental guarantee of the Constitution, and the courts indulge every reasonable presumption against its waiver. In the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, *in reversing a judgment notwithstanding the verdict*, the Supreme Court of the United States, Mr. Justice Van Devanter, speaking for the Court, stated:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . ."
>
> "It has been often said by this Court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. *Consequently, every reasonable presumption should be indulged against its waiver.* For these reasons the judgment below must be reversed."

Furthermore, in the instructions to the jury (Defendant's appendix 53), the Court, after reviewing the evidence, stated: "And I instruct you that if you find such facts to be from the evidence and by its greater weight, the burden being on the defendant, . . . it would be your duty, and I instruct you peremptorily as a matter of law, that it is

your duty and responsibility to answer that second issue; 'Nothing'." The jury responded with a verdict of "Nothing", thereby indicating that they found the facts to support such verdict.

In its opinion the Court below proceeds in an attempt to speculate on what might have been the intentions of the parties. When an agreement is ambiguous, there is no better evidence of the intention of the parties than their own testimony as to their understanding of their agreement. On that facet, Blumenthal testified but Reiner failed to testify. Blumenthal testified that it was his understanding, "That those notes would be paid and he would pay me for my stock $59,000 ($55,949.70) the book value, and we would just call it a day." (Defendant's appendix 95). And further, he testified under cross examination, "the notes applied against my stock because the stock was worth twice the amount of the notes." (Defendant's appendix 95). And even further, he testified, "I agreed to take book value $59,000 ($55,949.70), and he agreed to pay me, and with that $59,000, I paid those $25,000 notes." (Defendant's appendix 91). Such understanding was never denied nor refuted by the respondents at the trial.

Most appropriate is the statement by Justice Black, in *Galloway* vs. *United States*, 63 S. Ct. 1077, 319 U. S. 372, 87 L. Ed. 1458, as follows:

> "The language of the Seventh Amendment cannot easily be improved by formulas. The statement of a district judge in Tarter v. United States, 17 F. Supp. 691, 692-693, represents, in my opinion, the minimum meaning of the Seventh Amendment:
>
> 'The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is

substantial evidence to support the claim of the plaintiff in an action. If a single witness testifies to a fact, sustaining the issue between the parties, or *if reasoning minds might reach different conclusions from the testimony of a single witness*, one of which would substantially support the issue of the contending party, *the issue must be left to the jury.* Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.' "

Nevertheless, the opinion of the Court below and the opinion of the District Court are both completely silent on the above uncontradicted crucial testimony, which alone demands a jury verdict.

The distinction between directing a verdict or granting a new trial after verdict was carefully drawn by Chief Judge Parker in the case of Garrison v. United States, 62 F. 2d 41, (C.C.A. 4th), in these words:

"There seems to be some confusion . . . as to the difference between the duty to direct a verdict and the duty to grant a new trial after verdict. The distinction, however, is clear . . . verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed, or where the evidence is all against him, or so overwhelmingly so as to leave no room to doubt what the fact is . . . Verdict may be set aside and a new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion, the trial judge thinks this action necessary to prevent a miscarriage of justice."

Accordingly, it was in the discretion of the trial judge to set aside the verdict and order a new trial, however, with

substantial evidence existing in behalf of the defendant, the trial judge did not have the right under the Seventh Amendment to grant the motion for judgment notwithstanding the verdict of the jury.

The memorandum decision of the District Court, in which the motion for judgment notwithstanding the verdict was granted, fails to find that there was no substantial evidence to support the verdict for the defendant, fails to consider the evidence in the light most favorable to the defendant, fails to draw all reasonable inferences in favor of the defendant, fails to abide by the established rules of construction, and deprives the defendant of his right to trial by jury as guaranteed by the Seventh Amendment. (Defendant's appendix 37, and objections and exceptions thereto 47).

The test on the granting of a motion for judgment notwithstanding the verdict, is whether or not "fair minded men may draw different inferences". *Tiller* v. *Atlantic Coastline R. R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

In the case before this Court, we have a situation where one man, the Judge of the District Court, was drawing utterly contradictory conclusions from the same evidence. It is for the jury under the law of this land to draw the final conclusions.

It is a fundamental and established rule of construction that where the language of an agreement is susceptible of two constructions, one of which makes it fair while the other makes it inequitable and unjust, the Court will prefer the construction that is equitable. *Fairbanks* v. *Twin City*, 170 N. C. 315, 86 S. E. 1051.

Such rule of law, although presented in briefs, was not considered by the lower courts. The facts are uncontradicted that the defendant has already paid to the plaintiffs the sum of $75,000.00 for which he has never received one penny. If the existing judgment of the District Court is permitted to prevail, the plaintiffs will receive another $25,000.00 plus interest making a total of $100,000.00. And still the defendant has never received a penny and never will receive anything for the money paid out. To permit the plaintiffs to take $100,000.00 under the circumstances is a harsh and unjust decision. The plaintiffs have all of the stock that they started with plus $75,000.00, yet they seek another $25,000.00 plus interest. In determining the equitable interpretation it is most significant that at the time the stock was purchased on October 1, 1948, the book value was approximately $56,000.00, for which the plaintiffs demanded a price of $190,000.00. In the agreement of January 23, 1951, the plaintiffs did not set the purchase price in paragraph 2(c) to be $190,000.00, nor what would have been the price at which the stock could have been sold at a public sale, but insisted that they could take the stock, in the event of default, at book value.

The equitable rule of interpretation is clear. For there to be some measure of justice in the interpretation, the judgment notwithstanding the verdict should be reversed and in addition the defendant should be entitled to recover the surplus of the book value over the notes from the plaintiffs on his third counterclaim.

The issue arising from the third counterclaim with respect to the right of the defendant to recover from the plaintiffs the difference between the amount of the notes and the book value of the capital stock is one that the defendant is entitled to have decided by a jury.

Actually what has happened is that the judges of the lower courts have re-examined evidence offered in a common lawsuit, weighed conflicting evidence and conflicting inferences, and then have held that the petitioner may never take this case to a jury. The statement of Justice Black in the dissent in *Galloway* v. *United States*, supra, is most appropriate:

> ". . . Either the judge or the jury must decide facts, and, to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. . . . So few of these cases come to this Court that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeals are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function . . ."

B. THE DECISION OF THE COURT BELOW CONDONES A FORFEITURE WHICH HAS BEEN DECLARED UNLAWFUL BY APPLICABLE STATE LAW.

All of the evidence conclusively shows that the 45 shares of capital stock were held by the Reiners as collateral. The agreement so states. (Par. 3, Defendant's appendix 23). Reiner so stated. (Defendant's appendix 71). Accordingly, the relationship that was created was one of pledge and the laws pertaining to pledges are part and parcel of the agreement. The existing law is part and parcel of every contract.

Farmers and Merchants Bank of Monroe v. *Federal Reserve Bank of Richmond*, 43 S. Ct. 651, 262 U. S. 649, 67 L. Ed. 1157.

The legal effect of a pledge depends upon the local law. *Dale* v. *Pattison*, 34 S. Ct. 785, 234 U. S. 399, 58 L. Ed. 1370.

The Rules of Decision Statute provides that "the laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply". Title 28, U.S.C.A. 1652. In *Huddleston* v. *Dwyer*, 64 S. Ct. 1015, 322 U. S. 232, 88 L. Ed. 1246, this Court stated:

> "It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision."

The pledge agreement was executed in the State of New York, accordingly, the Court below was required by statute and by the decisions of this Court to apply the law of the State of New York with respect to pledge.

In the State of New York, it is established law that any provision in an agreement for the forfeiture of a pledge is void. The rule was succinctly stated in the case of *First Trust and Deposit Co.* v. *Potter*, 278 N. Y. S. 847:

> "A provision in the contract that the absolute property in the collateral pledged shall, upon default, vest in the pledgee, is void."

For centuries, it has been a fundamental rule of the common law that the forfeiture of a pledge is contrary to public

policy. In the case of *Hawley* v. *Hawley*, 114 F. 2d 745 (C.C.A.-D.C.), the rule was stated as follows:

> "The pledgee is not entitled upon the pledgor's default to take the property as his own in satisfaction of the debt. A provision in the contract by which the absolute property in the pledge is to vest in the pledgee upon default of the pledgor is void, and the pledgor is still entitled to redeem . . . This is the universally accepted rule."

Regardless of the provisions of a pledge agreement, there must be a proper foreclosure in accordance with the law. A foreclosure would require a bona fide public sale wherein it would be the duty of the pledgee to secure the highest market price.

Article 9, Sec. 200, et seq. of the Lien Law of the Statutes of New York provides for a public sale, notice to the pledgor, and advertisement in a newspaper, and a public auction for a foreclosure on a pledge. Equity assigns to pledgor and pledgee a trust relationship wherein the pledgee holds the pledge as a fiducary for the pledgor. *In re Kiames Estate*, 309 N. Y. 329, 130 N. E. 2d 745. Furthermore, pledge contracts must be construed favorably for the interest of the pledgor. *Cole* v. *Manufacturers Trust Co.*, 299 N.Y.S. 418. Accordingly, there was no foreclosure in the eyes of the law.

It should be remembered that on October 1, 1948, the plaintiffs represented to the defendant-appellant that the value of 45 shares of capital stock was $190,000.00. The defendant-appellant has already paid $75,000.00 on account, and the judgment as it now stands would compel him to pay an additional $25,000 plus substantial interest without his ever having received one penny in value from the transac-

tion, and would also forfeit his stock. There has been no foreclosure under the law to determine the actual market value of the stock on the date that it was taken in order to determine what surplus, if any, should be paid to the petitioner.

The reference in 2(c) to survival of the notes can mean survival only in the event that the book value was less than the amount of the notes, if it can have any lawful meaning at all. In that respect, the Judge of the District Court stated:

> "The Court: I construed that to mean if the book value was less than the $25,000.00, then the remainder should survive." (R.p. 215).

If the decision of the Court below is allowed to stand as now written, then it constitutes a forfeiture and confiscation and is contrary to public policy.

The only manner in which the contract can be held to be legal is to hold that paragraph 2(c) means that the Reiners purchased the stock and for the book value of it, and they must deduct the amount of the promissory notes and pay the balance to Blumenthal. If a contract is susceptible of two meanings, the one which indicates its validity must be adopted. *Levine* v. *Susser*, 189 N.Y.S. 106.

The opinions of the Court below and the District Court are silent on the matter of forfeiture, yet both Courts were presented with ample citations of the authoritative law in both briefs and oral argument.

Accordingly, the decision of the lower Court in condoning the forfeiture of corporate stock pledged as collateral, is in conflict with applicable and established state law, and in

conflict with law established by the United States Court of Appeals for the District of Columbia, thereby depriving the petitioner of property without due process of law and contrary to "law of the land".

CONCLUSION

It is significant that the lengthy opinion of the Court of Appeals for the Fourth Circuit does not cite, discuss, nor distinguish any one of the many authorities cited in the briefs filed by each of the parties, except the three cases cited on the question of interest, which was merely an incidental part of the action and of the appeals.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

This the 17th day of October, 1957.

Respectfully submitted,

Maurice A. Weinstein of
WEINSTEIN AND MUILENBURG

Fred B. Helms and
William H. Bobbitt, Jr., of
HELMS AND MULLISS

Attorneys for Petitioner,
Isadore D. Blumenthal

Appendix

OPINION OF

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7422.

Isadore B. Blumenthal,
Appellant,
versus
Leon Reiner and wife, Bertha Reiner,
Appellees.

No. 7382.

Isadore D. Blumenthal,
Appellant,
versus
Leon Reiner and wife, Bertha Reiner,
Appellees.

No. 7399.

Leon Reiner and wife, Bertha Reiner,
Appellants,
Isadore D. Blumenthal,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE.

(Argued June 10, 1957. Decided July 19, 1957.)

Before SOPER, SOBELOFF and HAYNSWORTH, Circuit Judges.

Francis E. Winslow and Harold D. Cooley (Hubert E. May; Cooley & May, and Battle, Winslow & Merrell on brief) for Appellants in No. 7399 and Appellees in Nos. 7382 and 7422; and Fred B. Helms, William H. Bobbitt, Jr., and Maurice A. Weinstein (Weinstein and Muilenburg, and Helms & Mullis on brief) for Appellee in No. 7399 and Appellant in Nos. 7382 and 7422.

SOPER, Circuit Judge:

This suit was brought by Leon Reiner and Bertha Reiner, his wife, of New York against Isadore D. Blumenthal of Charlotte, North Carolina, for the collection of two promissory notes aggregating $25,000.00 given by the defendant to the plaintiffs on January 23, 1951. The controversy arose out of a written contract dated October 1, 1948, wherein the Reiners sold and transferred 45 shares of the stock of L. and B. Reiner, Inc., a New York corporation, to Blumenthal for the sum of $190,000.00. The corporation had succeeded a partnership composed of the Reiners in the business of distributing and servicing surgical and medical requirements for a large part of the United States. The parties had known each other for many years and each of them had had extensive experience in the business world. A total of 90 shares of stock of the corporation were outstanding, so that by reason of the contract the Reiners and Blumenthal each owned a one-half interest in the enterprise. In payment for the stock, Blumenthal gave $50,000.00 in cash and twenty promissory notes in the aggregate sum of $140,000.00 payable over a period of ten years. The stock was deposited as collateral security for the payment of the notes. The Reiners became the president and secretary-treasurer, respectively, and Blumenthal the executive vice-president of the corporation.

The enterprise had been a profitable one but after 1948 the volume of the business and the profits steadily decreased and Blumenthal became dissatisfied with the bargain and did not pay the notes as they fell due. Some conferences between the parties took place and finally the parties reached a compromise during a visit of Blumenthal to New York. During this visit he was served with a summons in an action brought by the Reiners on the past due promissory notes in the Supreme Court of the State of New York. This suit, however, was dismissed when the parties signed an agreement of settlement on January 23, 1951, under which the two promissory notes in suit, one for $10,000.00 payable November 15, 1951, and one for $15,000.00 payable November 15, 1952, were given.

The pending controversy depends upon the construction of this agreement. The preamble referred to the sale of the stock under the prior contract of October 1, 1948, recited that the sum of $158,900.00, representing the balance of the purchase price of the stock with interest remained unpaid, and set out the desire of the parties to amend that agreement.

The body of the new agreement contained the following provisions:

Section 1 terminated and cancelled the agreement of October 1, 1948.

Section 2 declared that the unpaid balance of $158,900.00 of the purchase price of the stock should be paid as follows:

(a) Simultaneously with the execution of this agreement, Blumenthal will pay to Leon Reiner and Bertha Reiner jointly the sum of $25,000.00.

(b) Simultaneously with the execution of this agreement, Blumenthal will execute and deliver to Leon Reiner and Bertha Reiner two (2) promissory notes payable to their order with interest at three (3%) per cent per annum as follows: one note in the face amount of $10,000.00 payable on November 15, 1951, and one note in the face amount of $15,000.00 payable on November 15, 1952. Said notes shall provide that in the event the note first due is not paid on its due date, then the second note shall forthwith become due and payable.

(c) In the event of a default in the payment of either of the aforesaid notes, Leon Reiner and Bertha Reiner jointly shall forthwith be deemed to have purchased the said forty-five (45) shares of stock now owned by Blumenthal in the same manner as if an offer to sell the same had been made by Blumenthal at the book value thereof. The obligation of Blumenthal to pay the amounts set forth in said notes, together with interest, shall nevertheless survive, Blumenthal shall continue liable therefor and Leon Reiner and Bertha Reiner may institute any action at law or otherwise to enforce collection of same.

(d) The balance of $108,900.00 with interest at three (3%) per cent from the date hereof shall thereafter be payable only out of dividends paid on the corporate stock now owned by Blumenthal, corporate salaries and bonuses or any other sums, if any, that may become due or payable to Blumenthal from the corporation. Blumenthal does hereby authorize the Corporation to pay over to Leon Reiner and Bertha Reiner jointly all such dividends, salaries and bonuses or any other sums, if any, that may become due and payable to him at any time on or prior to September 1, 1958, to be applied against said balance

of $108,900.00 until the same, plus accrued interest at three (3%) per cent, has been fully paid and discharged. If any balance, as aforesaid, remains unpaid on September 1, 1958, Blumenthal does hereby sell, transfer and assign the forty-five (45) shares of the corporate stock now owned by him to Leon Reiner and Bertha Reiner jointly, the purchase price to be the amount of said balance which shall be credited in full payment of said balance and said shares shall be and become the sole property of Leon Reiner and Bertha Reiner without any right of redemption thereto in Blumenthal with the same force and effect as if Blumenthal had offered the same for sale to Leon Reiner and Bertha Reiner at the amount of said balance and Leon Reiner and Bertha Reiner had accepted said offer.

(e) In the event of a dissolution or liquidation of the Corporation, any sums that may become due and payable as a result thereof on the shares of corporate stock now held by Blumenthal, are hereby assigned to Leon Reiner and Bertha Reiner jointly to apply against the balance of $108,500.00 with interest as aforesaid and only the surplus, if any, shall be delivered to Blumenthal.

3. Pending payment in full of the balance as aforesaid, Leon Reiner and Bertha Reiner shall hold said forty-five (45) shares of corporate stock now registered in the name of Blumenthal as collateral security for the payment of said sum.

The decision in this case turns primarily on the interpretation of the foregoing sections of the agreement. A strong light, however, is thrown upon their meaning by subsequent provisions of the contract. Amongst other things, Section 5 declared the intent of the parties to maintain the capital of

the corporation for any losses sustained during each year until September 1, 1958, by making loans to the corporation whenever it should need additional working capital. The contributions were to be made in accordance with respective stock interests of the parties and each party agreed to pay his proportionate share of the loss during any six month's period within fifteen days after notice of the amount of the loss as determined by the corporation's accountants; and it was provided that if Blumenthal should fail to pay the amount required of him in such case within ten days, this should be deemed an acceptance by the Reiners of an offer by Blumenthal to sell his shares to the Reiners at the book value thereof. The agreement further provided that Leon Reiner would receive a salary of $15,000.00 a year and that Blumenthal and Bertha Reiner would receive equal salaries in amounts fixed by the Board of Directors. There were also provisions for giving the Reiners first opportunity to buy the Blumenthal stock in case he should determine to sell; provision for the ascertainment of the book value of the stock; provisions for the acquisition of the stock by the survivors in case of the death of one of the parties to the agreement; and, finally, provision for the execution by the parties of formal instrument releasing all of the parties from all obligations other than those contained in the agreement. Such releases were actually executed.

Blumenthal paid the sum of $25,000.00 in cash to the Reiners, and gave his notes for $25,000.00 as provided by the agreement; but the subsequent period of joint operation of the corporation, which was obviously contemplated to last at least until September 1, 1958, shortly came to an abrupt end. Prior to November 15, 1951, when the note for $10,000.00 came due, Blumenthal notified the Reiners that he would not pay the two notes, and on that date actually defaulted in the payment of the first note. In the

meantime, no reduction in the balance of the indebtedness in the sum of $108,900.00 had been made since no dividend had been declared by the corporation — and no salary or bonus had been paid or become due to Blumenthal. Thereupon the Reiners, in accordance with provisions of Section 2(c) of the settlement agreement, took over the 45 shares of Blumenthal's stock as purchasers. The book value of these shares at that time, according to the stipulation of the parties, was $55,949.70. After this default the present litigation ensued.

The Reiners brought suit in the District Court below upon the two promissory notes, the second note having become due under the agreement by reason of default on the first, and claimed judgment for $10,000.00 with interest at 3 per cent from January 3, 1951 until November 15, 1951, on the first note, and thereafter at the interest rate of 6 per cent until paid; and also judgment for $15,000.00 with interest at the rate of 3 per cent up to November 15, 1952, on the second note and thereafter interest at the rate of 6 per cent.

The defendant filed an answer denying liability for the amounts claimed in the complaint and filed three counterclaims. In the first counterclaim it was alleged that L. and B. Reiner, Inc., was never validly incorporated, in that the corporation did not have at least three directors and three stockholders as required by the laws of the State of New York and hence no capital stock of the corporation was ever validly issued and, therefore, the representations by the plaintiffs that the corporation was duly organized were false and fraudulent, whereby the defendant was deceived and induced to purchase 45 shares of the alleged stock. It was also alleged in the counterclaim that the plaintiffs had made certain representations as to the volume of business of the

corporation which were false and made with the intent to defraud the defendant and induce him to purchase the stock, and that the stock was purchased on the faith of these fraudulent representations; and also that the plaintiffs had grossly mismanaged the affairs of the corporation so that it suffered heavy losses. In consequence, the defendant claimed that the plaintiffs were indebted to him for the sum of $75,000.00, being the cash sums that he theretofore paid for the stock.

The second counterclaim was based on the allegation that through the foregoing circumstances the defendant was induced through the fraudulent acts and representations of the plaintiffs to execute the promissory notes in suit with the result that recovery on those notes were barred and the plaintiffs became indebted to the defendant for the sum of $75,000.00.

The third counterclaim sought the recovery of the sum of $32,645.00 from the plaintiffs, representing the difference between the alleged book value of the stock in the sum of $57,645.08 on November 15, 1951, and the aggregate sum of the two promissory notes of $25,000.00. The answer of the plaintiffs to the counterclaims set up denials of the pertinent allegations and denied liability.

The case came on for trial before the District Judge and jury and each party filed a motion for a directed verdict. In fact, it was agreed that the case was one for peremptory instruction by the Judge. The District Judge was in accord with this position. He refused to submit to the jury any issue with reference to the counterclaims of the defendant, thereby ruling that there was no evidence to support them. He submitted two issues to the jury with respect to the plaintiffs' suit on the notes: (1) whether the notes were

executed and were in default and (2) as to what amount, if any, the defendant was indebted to the plaintiffs. However it was agreed by the parties that the answer to the first question should be "Yes", and the Judge directed the jury to answer the second question with the word "Nothing", so that in effect a peremptory instruction in favor of the defendant was given and the judgment to this effect was entered. Subsequently, after careful re-examination of the case, on motion by the plaintiffs under Rule 50(b) of the Federal Rules of Civil Procedure, the Judge entered judgment n.o.v. for the plaintiffs for the amount due on the two promissory notes with interest at 3 per cent from the date of the note to the date of judgment. The defendant appeals (1) from the judgment in favor of the plaintiffs on the promissory notes, case No. 7422; and (2) from the judgment in favor of plaintiffs on defendant's counterclaims, case No. 7382; and plaintiffs appeal from the provision of the judgment in their favor on the promissory notes limiting the interest to 3 per cent between the due date of the notes and the date of the judgment, case No. 7399.

The principal controversy in the case relates to the application of the sum of $55,949.70, the stipulated value of the stock deposited as collateral. On the part of the plaintiffs, it is contended that the value of the stock should be applied against the balance of the debt ($108,900.00) remaining due after crediting the cash payment of $25,000.00 and the promissory notes of $25,000.00 that were given in the settlement of January 23, 1951. Under this interpretation the balance of the debt is reduced from $108,900.00 to $52,950.30 since the payment of the balance was to be made only out of moneys which should become payable to Blumenthal by the corporation prior to September 1, 1958, and this source of income has been cut off by the transfer of Blumenthal's stock to the Reiners and his complete severance

from the business. On the other hand, the defendant contends that the book value of the stock should be applied entirely to the indebtedness of $25,000.00 due on the notes with the result that the defendant is entitled to a judgment against the plaintiffs in his favor on his third counterclaim in the sum of $30,949.70, the excess of the purchase price of the stock over the amount due on the notes. Under this theory the defendant would be relieved from the entire obligation to pay the balance of the indebtedness of $108,900.00. In our view, the interpretation placed upon the agreement by the plaintiff, which was finally approved by the District Judge, is correct and must be sustained.

The situation of the parties at the time of the settlement of January 23, 1951, as disclosed by the undisputed evidence, was such that the interpretation of the defendant cannot reasonably be entertained. At that time Blumenthal was under an absolute obligation to pay to the Reiners the sum of $158,900.00 with interest on his unpaid promissory notes in accordance with the agreement of October 1, 1948. But the business in which he had purchased the one-half interest had not been as profitable as he expected and so he prevailed upon the Reiners, his long time acquaintances, to relieve him from his obligation and to give him more favorable terms. By the new arrangement the balance of $158,900.00 due by him under the 1948 agreement was reduced to $108,900.00 through the payment by him of $50,000.00 made up of $25,000.00 in cash and $25,000.00 in notes; and the absolute obligation to pay the balance of $108,900.00 was reduced to a contingent liability measured by the moneys which he would thereafter receive in dividends, salaries and bonuses in the interval between January 23, 1951 and September 1, 1958, a period of seven and three-quarter years.

Obviously the parties contemplated joint operation of the business for an extended period. It was agreed not only that

Blumenthal's dividends and compensation should be applied to the balance of the indebtedness until September 1, 1958, but also that in the meantime he would cooperate with the Reiners in making loans to the corporation if it should become necessary to do so in order to furnish it with adequate working capital. Provision, however, was carefully made for restricting Blumenthal's liability in the event he should fail to keep his promises, either to pay the notes aggregating $25,000.00 or to make the loans to the corporation as above described. In either case, the stock was to be bought by the Reiners at its book value and his connection with the enterprise would automatically terminate. It was also provided that if any balance of the debt of $108,900.00 should remain unpaid on September 1, 1958, the stock would be transferred to the Reiners and accepted as full payment of the balance due. But this was not all. Although the possibility of defaults on Blumenthal's part were contemplated, he was not at liberty to repudiate his promises at will, and it was specifically provided in Section 3 of the contract that pending payment in full of the balance due, in the sum of $108,900.00, the Reiners should hold the Blumenthal stock as collateral security for the payment thereof.

Keeping these facts in mind it is seen that the defendant's position is untenable. He contends that immediately upon the execution of the agreement of January 23, 1951, it lay within his power, by the simple device of declaring a default on the promissory notes, not only to wipe out the balance of the debt of $108,900.00, but also to nullify completely the clause that the stock should be held as collateral security for the payment thereof. Thus instead of owing $25,000.00 absolutely, and $108,900.00 contingently secured by the stock as collateral, he would owe only $25,000.00 on the notes and would become the seller of the stock at the book

value of $55,949.70, leaving a balance in his favor of $30,949.70.

Such a result could not possibly have been contemplated by the parties. They had just entered into a compromise settlement which substantially lightened the obligations of Blumenthal under the earlier agreement but obligated him, nevertheless, to maintain his connection with the enterprise and allowed the Reiners to retain his stock as collateral security for the payment of the balance of the debt. It is inconceivable in this situation that they intended to put it in his power immediately to destroy the only security which the Reiners had for the performance of this obligation. Two important factors must be kept in mind throughout the discussion: (1) that it was expressly agreed in Section 2(c) of the new agreement that, although upon default the Reiners would purchase the stock of Blumenthal, nevertheless, his obligation to pay the amount of the notes would survive; and (2) that the Blumenthal stock was not held as collateral security for the payment of the notes but, as collateral security for the payment of the balance of the debt in the sum of $108,900.00 under the terms of Section 3 of the agreement. This provided that the collateral should be held as security for the payment "of the balance aforesaid", which is described in Sections 2(d) and 2(e) as "the balance of $108,900.00".

The defendant's position is tenable only if attention is confined to the provisions of Section 2(c) of the agreement and the provisions of 2(d) under Section 3 are entirely ignored. Under the latter sections Blumenthal could have retained his interest in the corporation and devoted the moneys received from it to the payment of the balance of the debt until September 1, 1958, whereupon it would have

been automatically paid in full by the transfer of the Blumenthal stock to the Reiners, whatever its value at that time. But Blumenthal was unwilling to take this course. To the contrary, for purposes of his own, he gave up his stock in the corporation, severed his connection with the business, destroyed the only source from which the payment of the balance of his debt could be made, and refused to carry on as he had agreed. Undoubtedly he had the power under the agreement to take this course, but it nevertheless amounted to a default in the payment of the debt and justified the application of the collateral, as far is it would go, to its liquidation. Unless Section 3 of the agreement is given this effect upon the default of Blumenthal prior to September 1, 1958, it has not meaning at all.

The defendant argues that the terms of the agreement are ambiguous and therefore should have been submitted to the jury for their interpretation. We think, however, that the agreement is not ambiguous and agree with the position taken not only by the plaintiffs but by the defendant himself in the trial below, that the question was to be determined by the Judge.

There is no substance in the additional defenses and counterclaims of the defendant, under which it is asserted that the initial agreement was vitiated by fraudulent representations of the Reiners upon which Blumenthal relied; and, also, that the shares of stock in Blumenthal's name were invalidly issued because the corporation was organized with less than three stockholders and three directors and therefore never came into existence. The defendant, however, did not offer to show in what way he was deceived regarding the volume of the corporate business and there is no reason to believe that he did not know the pertinent facts as to the enterprise in which he was purchasing a one-half interest.

The facts as to the incorporation of the business seem to be that the two Reiners, and a third person who was the nominal owner of a single share of stock participated in the organization of the corporation, but afterwards the third person transferred the share to the Reiners. No New York decisions are cited in support of the contention that under such circumstances the corporation had no existence; but, in any event, the point is lacking in substance, since there is nothing to show that the Reiners did not endeavor in good faith to form a valid corporation and, more particularly, nothing to show that Blumenthal failed to get substantially what he intended to buy, or that he suffered any loss by reason of any imperfection in the corporate setup. Even if it be conceded that the corporation did not come into being, it is nevertheless true that Blumenthal purchased an interest in a business belonging to the Reiners, which he has now disposed of, and that, in the meantime, he has suffered no detriment by reason of the fact that he purchased an interest in a partnership rather than in a corporation, if such be the fact.

The cross-appeal of the Reiners is based upon the contention that the District Judge was in error in allowing only 3 per cent interest on the notes from January 23, 1951, until the date of judgment and 6 per cent thereafter. It is said that the court should have allowed interest at the legal rate of 6 per cent per annum prevailing in North Carolina from the date of default to the date of judgment. The amount involved is approximately $4,000.00. It is conceded that the inquiry should be directed to the intention of the parties as manifested in the contract and that the North Carolina law governs, since it is well settled that, where interest is due for the failure to pay a note which is made in one place but is to be paid in another, the law of the place

of payment governs the rate. See 11 Am. Jur. Conflict of Laws, §162. In the present instance the matter is not difficult of determination because the rate of interest was specifically provided in the notes themselves and also in Sections 2(b) and 2(c) of the agreement of settlement. In the latter it was provided that the notes should be payable with interest at 3 per cent per annum and that in case of default the Reiners would become the purchasers of the stock, but the obligation of Blumenthal "to pay the amounts set forth in said notes, together with interest, shall nevertheless survive". The inference is irresistible that the amount of interest to be paid after default was at the rate of 3 per cent as set forth in the preceding paragraph of the agreement. It is worthwhile to recall in this connection that under the original agreement of October 1, 1948, the Blumenthal indebtedness carried interest at the rate of 6 per cent, so that the reduction of the rate of interest to 3 per cent in the compromise agreement was clearly one of the concessions made to the debtor in order to lessen the burden of what had turned out to be an unfortunate contract on his part. The settlement, as we have seen, made express provision for the rights and obligations of the parties that would ensue in the event of a subsequent default by Blumenthal, and one of the provisions was that the obligation of Blumenthal to pay the notes, "together with interest", should nevertheless survive. We think the parties must have had in mind the specified rate of 3 per cent and not the legal rate of 6 per cent which prevails in North Carolina. See *Womble* v. *Little & Mordecai*, 74 N.C. 255; *Pass* v. *Shine*, 113 N.C. 284; *Wadesboro Cotton Mills* v. *Burns*, 114 N.C. 353.

The judgment of the District Court is

Affirmed.